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IN THE

Supreme Court of the United States

October Term, 1958

No. 547.

DAVID BOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI; AND PETITION FOR REHEARING

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DAVID BOHN,

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A

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner, David Bohn, respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 12, 1959. Rehearing is sought at this time because the same issue which petitioner seeks to present—whether the denial of his motion at the trial for the production of the relevant grand jury minutes of the principal prosecution witness for use in cross-examination constitutes error—is now pending before this Court on certiorari to the United States Court of Appeals for the Fourth Circuit in *Pittsburgh Plate Glass Company v. U. S.*, 260 Fed. 2d 397, and *Galax Mirror Company v. U. S.*, 260 Fed. 2d 397, certiorari granted December 15, 1958.

Justice requires that petitioner, who was sentenced to a year and a day and fined the sum of $5,000, and who is now confined at the U. S. Penitentiary, Terre Haute, In-

diana, should receive the same opportunity to have his judgment of conviction reviewed by this Court as has been accorded the corporate defendants, Pittsburgh Plate Glass Company, Inc. and Galax-Mirror Company, Inc.

Although this petition for a rehearing is filed after the expiration of the time prescribed in Rule 58, it is based upon substantial grounds available to the petitioner, although not previously presented, and the Court clearly has power, in its discretion, to entertain the petition.

Schriber-Schroth Co. v. *Cleveland Trust Co.; et al.*, 305 U. S. 47, 50;
Zap v. *U. S.*, 330 U. S. 800;
Land v. *Dollar*, 341 U. S. 737, 738;
Pickett v. *Union Terminal*, 314 U. S. 704.

April 28, 1959.

SOLOMON S. GOLDSMITH,
Attorney for Petitioner.

B

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of January 12, 1959, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case, as prayed for in the petition heretofore filed herein.

Reasons for Granting Rehearing and Issuing the Writ

Upon the original petition herein there was not presented to the Court, although available to the petitioner, the following substantial ground for the granting of a writ of certiorari.

1. That the denial of defendant's motion at the trial for the production of the relevant Grand Jury testimony of Samuel Golden, the principal witness for the prosecution, for use in cross-examination, constituted reversible error.

Rule Involved

Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. (Supp. V, 1938), is printed as Appendix A.

Statement

Background Facts.

The petitioner, a resident of Minneapolis, Minnesota, was indicted by a Federal Grand Jury in the United States District Court for Minnesota on two counts on April 5, 1957, charged with wilfully attempting to evade and defeat the 10% wagering taxes imposed by Section 4401, Internal

Revenue Code, Title 26, U. S. Code, Section 4401, in violation of Section 7201, Internal Revenue Code, Title 26, U. S. Code, Section 7201 (R. 10-13). On May 23, 1957, petitioner moved for a bill of particulars and requested, so far as here material, that the prosecution state whether it claimed that he was conducting the business of accepting wagers alone or in conjunction with others, and if with others, the name of such person or persons (R. 19).

On June 10, 1957, petitioner's motion for a bill of particulars was in all respects denied (R. 4). On September 20, 1957, the government filed a voluntary bill of particulars which did not, however, set forth the requested particulars (R. 24-25).

The trial began on September 30, 1957, before a court and jury. The first and principal prosecution witness was Samuel Golden (R. 26-46, 57, 101-102). Golden had been indicted for conducting the business of accepting wagers, and entered a plea of guilty in April, 1957 (R. 40). After he gave the government a statement, which included the claim that he worked for petitioner, he was sentenced in April, 1957, to a fine of $500 and three years' probation (R. 44).

Golden testified to accepting bets in substantial amounts on behalf of petitioner on baseball, football and basketball games during the period covered by the indictment (R. 26-35). The government at first attempted to establish that Golden was in partnership with petitioner (R. 26), and later that he was employed by him (R. 30), Golden testifying that petitioner paid him $75 a week for his services (R. 39).

Golden also testified that petitioner "accepted wagers on both sides of sports events" (R. 101). This testimony was particularly important, as evidenced by the fact that the jury, after deliberating for some four hours, returned with a request for a "definition of taking bets on both

sides", the foreman stating "That seems to be a point" (R. 155). The Court refused to give the jury the requested definition, saying that he did not think the jury needed it (R. 155). The Court then proceeded to emphasize the importance of this testimony by noting "that if a person bets on both sides of a sporting event, it is strong evidence of the fact that he is engaged in the business of accepting wagers" (R. 155). While the Court stated that it was his recollection that the testimony "about taking bets on both sides" was given by Mr. Tuttle, an Internal Revenue Agent (R. 155), the fact is that that testimony was given by Golden (R. 101). Mr. Tuttle had testified that he told the petitioner that if he accepted bets on both sides of a contest that might constitute a wagering business, but that he secured no information at that time that petitioner was engaged in the wagering business such as the law contemplated (R. 94).

The government considered the testimony with respect to accepting wagers on both sides of a sports event sufficiently important to recall Mr. Golden to testify on that very point, and this was the last evidence submitted to the jury before the government rested its case (R, 101-102).

Motion to Inspect Golden's Grand Jury Testimony

During the cross-examination of Golden it was elicited that he had testified before the Grand Jury which had returned the indictment against petitioner. The following motion was thereupon made:

> "Mr. Hammond: I make a motion that the government be directed to submit to me the transcript of the man's testimony before the Grand Jury.
> The Court: The motion is denied.
> Mr. Hammond: Exception" (R. 39).

Petitioner's motion made after the prosecution rested, to strike Golden's testimony on the ground that the infor-

mation with respect to his association, if any, with petitioner, which was requested in a bill of particulars, had been refused, with the result that a petitioner was surprised and prejudiced by Golden's testimony, was denied (R. 102).

At the close of the case on October 4, 1957, the jury returned a verdict of guilty on both counts (R. 159). Sentence was suspended on the conviction under the first count and petitioner was placed on probation for five years. On the second count petitioner was sentenced to imprisonment for one year and a day and a fine of $5,000 (R. 159-160, 161-165).

ARGUMENT

I

The grand jury testimony of Golden, the principal prosecution witness, should have been produced under the rule laid down by this Court in *Jencks* v. *United States*.

Jencks v. *United States*, 353 U. S. 657, held that defendant was entitled to the production of the reports to the Federal Bureau of Investigation made by two of its undercover agents who testified for the prosecution, for use in cross-examination. The relevancy and materiality of the reports, it was held, are established by showing that these reports relate to the testimony of the witness; that to require proof showing conflict or inconsistency would be "clearly incompatible with our standards for the administration of criminal justice in the federal courts"; and that justice requires that the defendant himself inspect the reports rather than have the trial court look for conflicts or inconsistencies.

Defendant's right to a transcript of any sworn statement given by Golden on the subject matter of his trial testimony for use in cross-examination is unquestioned

under the authority of *Jencks*. Unless, therefore, grand jury minutes are exempt from the standards for the administration of criminal justice enunciated in *Jencks*, the grand jury testimony of Golden, the principal witness for the prosecution, should have been produced under the *Jencks* rule.

II

The *Jencks* decision is applicable to the grand jury testimony of a witness who testifies in open court for the prosecution on the same subject matter as that of his grand jury testimony.

The argument that grand jury minutes are exempt from the standards for the administration of criminal justice, enunciated in *Jencks*, is based on the traditional secrecy of grand jury proceedings. Where, however, the grand jury witness has testified at the trial, to the extent that he covers the same subject matter, the secrecy of his grand jury testimony has been destroyed. Golden having testified at the trial, his grand jury testimony should have been produced for inspection upon petitioner's motion.

III

The trial court, under Rule 6(e), has discretion to order disclosure of grand jury testimony. The *Jencks* rule has eliminated the necessity for a prior showing of conflict or inconsistency.

It is well established that disclosure of grand jury testimony is wholly proper where sufficient cause is shown. Rule 6(e) specifically permits disclosure at the discretion of the court, and disclosure of grand jury testimony has been ordered. *Doe* v. *Rosenberry*, 255 F. 2d 118 (2d Cir. 1958).

It is well established too, that where defendant can show a contradiction between a witness' testimony at the trial and his grand jury testimony, the defendant may then have access to the witness' grand jury testimony for use in cross-examination.

> *U. S.* v. *Alper*, 156 F. 2d 222, 226 (2d Cir. 1946); *Herzog* v. *United States*, 226 F. 2d 561, 566 (10th Cir. 1955), cert. denied 352 U. S. 844.

In the present case it was established that when Golden was called before the Grand Jury in February 1957 and asked if he worked for petitioner he refused to answer (R. 38). At the trial, it will be recalled, his testimony was that he was employed by petitioner at a salary of $75 a week (R. 39). Even if this does not constitute a conflict or inconsistency, the Court erred in denying petitioner's motion since a prior showing of conflict or inconsistency is no longer necessary under *Jencks* to entitle a defendant to the production of the trial witness' grand jury testimony.

At the very least, even under the practice prior to *Jencks*, the court was required to inspect the minutes for contradictions and to determine if the testimony given at trial by Golden could be impeached through the use of the grand jury minutes. The failure to do so, therefore, was error, even assuming that the petitioner did not himself have the right to inspect the grand jury minutes.

IV

Three Courts of Appeals have considered the problem of grand jury testimony since *Jencks* was decided. *U. S.* v. *Rosenberg*, 245 Fed. 2d 870 (3rd Cir. 1957); *U. S.* v. *Spangelet*, 258 Fed. 2d 338 (2nd Cir. 1958); *Pittsburgh Plate Glass Co.*, and *Galax Mirror Co., Inc.* v. *U. S.*, 260 Fed. 2d 397 (4th Cir. 1958).

In *Rosenberg* the court treated grand jury minutes as on a par with F.B.I. reports, and reversed the trial court

for refusing to order their production as requested by the defense.

In *Spangelet*, the court refused to depart from the prior practice of inspection by a trial judge before permitting the defendant access. The court, however, adopted that branch of the *Jencks* decision which eliminates the necessity for the defendant to show an inconsistency in order to get an inspection by the trial court.

In *Pittsburgh Plate Glass Co.* and *Galax Mirror*, the court held that grand jury testimony should not be produced without prior inspection by the trial court, and that ordinarily the trial court should not inspect.

This Court granted certiorari in *Pittsburgh Plate Glass* and in *Galax Mirror*, limited to the question as to whether the denial of a defendant's motion at the trial for the production of the relevant grand jury minute testimony of the principal government witness in these cases, for the purpose of cross-examination, constituted error.

V

For the reasons stated by the Court in *Jencks*, justice requires that relevant and material evidence in the form of prior statements given to the prosecution by one of its witnesses must be made available to the defendant for use in cross-examination. There is no valid reason why a different rule should apply where the relevant and material evidence consists of testimony given by a witness before a grand jury.

Golden was the prosecution's key witness claiming that he worked for petitioner in the business of accepting wages. His testimony was the foundation upon which the government's case rested (R. 39, 44, 101, 155). In these circumstances the denial of petitioner's motion for the production of his testimony before the grand jury was error.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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HAROLD BAER, JR.,
of Counsel.

April 28, 1959.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58, Subdivision 2, of the rules of this Court.

SOLOMON S. GOLDSMITH,
Attorney for Petitioner.

APPENDIX A

United States Code, Supplement V, Title 18
Crimes and Criminal Procedure

Chapter 237. Rules of Criminal Procedure.

Federal Rules of Criminal Procedure for the United States District Courts.

As amended to November 12, 1957.

Rule 6. The Grand Jury.

* * *

(e) *Secrecy of Proceedings and Disclosure.*

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.